

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SALVADOR MONDACA-VEGA,  
Petitioner

V.

ERIC H. HOLDER, JR., Attorney  
General,

### Respondent.

No. CV-04-339-FVS

ORDER DENYING SUMMARY  
JUDGMENT

ERIC H. HOLDER, JR., Attorney  
General,

Respondent.

**THIS MATTER** came before the Court on March 18, 2011, based upon the Respondent's motion for summary judgment. The Respondent was represented by Katherine E.M. Goettel. The Petitioner was represented by Martha H. Rickey. During the hearing, the Petitioner orally moved for summary judgment. For the reasons set forth below, both motions are denied.

## BACKGROUND

The Petitioner has filed a petition with the Ninth Circuit Court of Appeals challenging a decision of the Board of Immigration Appeals ("BIA"). The Petitioner alleges the BIA erred in upholding an Immigration Judge's determination that he is not a citizen of the United States. The Ninth Circuit has ruled there is a genuine issue of material fact with respect to the Petitioner's nationality claim, and has, as a result, transferred the case to this Court for

1 resolution of the factual dispute. 8 U.S.C. § 1252(b)(5)(B). The  
2 Respondent acknowledges the circuit court's ruling regarding the  
3 existence of a genuine issue of material fact. Nevertheless, he  
4 argues he has uncovered evidence since the circuit court issued its  
5 ruling that demonstrates he is entitled to judgment as a matter of  
6 law. Accordingly, he moves for summary judgment. Fed.R.Civ.P. 56(a).  
7 The Petitioner objects.

8 **PARTIES' BURDENS AT EVIDENTIARY HEARING**

9 The Court's task is to make a *de novo* finding concerning the  
10 Petitioner's nationality. 8 U.S.C. § 1252(b)(5)(B). The issue is  
11 whether he is Reynaldo Mondaca Carlon, a citizen of the United States,  
12 or whether he is Salvador Mondaca-Vega, a citizen of Mexico. It is  
13 likely, though by no means certain, the ultimate burden of persuasion  
14 rests upon the Respondent. *Cf. Ayala-Villanueva v. Holder*, 572 F.3d  
15 736, 737 n.3 (9th Cir.2009) (in a removal proceeding, the "DHS then  
16 bears the ultimate burden of proving the respondent removable by clear  
17 and convincing evidence").<sup>1</sup> Nevertheless, since the Petitioner is, in  
18 essence, the plaintiff in a declaratory judgment action, he bears the  
19 initial burden of producing evidence which shows, by a preponderance  
20 of the evidence, he is a United States citizen. *Sanchez-Martinez v.*  
21 *INS*, 714 F.2d 72, 74 and n.1 (9th Cir.1983), *cert. denied*, 466 U.S.  
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24 <sup>1</sup>There are significant differences between a removal  
25 proceeding and this proceeding. Thus, the Court recognizes it  
26 must exercise caution in drawing guidance from removal  
proceedings.

1 971, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984). If he fails to make a  
 2 prima facie showing, then the Respondent is under no obligation to  
 3 present evidence. He is entitled to a declaration that the Petitioner  
 4 is not a United States citizen. By contrast, if the Petitioner makes  
 5 a prima facie showing, then the burden shifts to the Respondent. The  
 6 Respondent's rebuttal burden depends upon the nature of the evidence  
 7 the Petitioner offers. See *id.*

8 The Petitioner alleges the Secretary of State has determined he  
 9 is a United States citizen and issued a passport to him. As he points  
 10 out, Congress has authorized the Secretary to perform these functions.

11 See, e.g., *Magnuson v. Baker*, 911 F.2d 330, 333 (9th Cir.1990).<sup>2</sup> Only  
 12 a citizen of the United States is entitled to a United States  
 13 passport. *Vana v. Attorney General*, No. 08-1595, 2009 WL 2450513 at

14 \*2 (3rd Cir. Aug. 12, 2009) (unpublished). A valid passport has "the  
 15 same force and effect . . . as certificates of naturalization or of  
 16 citizenship issued by the Attorney General or by a court having  
 17 naturalization jurisdiction[.]" 22 U.S.C. § 2705. Indeed, possession  
 18 of a valid passport ordinarily is "conclusive proof of citizenship."  
 19 *Magnuson*, 911 F.2d at 333. If the Petitioner proves the Secretary of

20 State has previously determined he is a United States citizen, then

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23 <sup>2</sup>*Magnuson* held the Secretary of State may "revoke a passport  
 24 evidencing citizenship only (1) after affording the holder an  
 25 opportunity to be heard and (2) on exceptional grounds such as  
 26 fraud or misrepresentation." 911 F.2d at 336. This holding has  
 been superseded by statute. *Atem v. Ashcroft*, 312 F.Supp.2d 792,  
 797-800 (E.D.Va.2004).

1 the Respondent bears the burden of rebutting the Secretary's previous  
 2 determination by "'clear, unequivocal, and convincing evidence.'"  
 3 *Sanchez-Martinez*, 714 F.2d at 74 and n.1 (quoting *Woodby v. INS*, 385  
 4 U.S. 276, 286, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966)).

5 **SUMMARY JUDGMENT STANDARD**

6 On December 1, 2010, amendments to Federal Rule of Civil  
 7 Procedure 56 became effective. Rule 56(a) now states:

8 A party may move for summary judgment, **identifying each**  
 9 **claim or defense -- or the part of each claim or defense --**  
 10 on which summary judgment is sought. The court **shall** grant  
 11 summary judgment if the movant shows that there is no  
 12 genuine **dispute** as to any material fact and the movant is  
 13 entitled to judgment as a matter of law. The court should  
 state on the record the reasons for granting or denying the  
 motion.

14 (Emphasis added.) Despite the changes, "[s]ubdivision (a) carries  
 15 forward the summary-judgment standard expressed in former subdivision  
 16 (c) [.]" Fed.R.Civ.P. 56 advisory committee note (2010 Amendments).  
 17 Under Rule 56, a party's eligibility for summary judgment depends upon  
 18 whether it will bear the burden of persuasion at trial. *Nissan Fire &*  
*19 Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102-03  
*20* (9th Cir.2000). Here, the Petitioner will bear the initial burden of  
 21 production at the evidentiary hearing. He must make a *prima facie*  
 22 showing that he is a citizen of the United States. Thus, the  
 23 Respondent may obtain summary judgment by demonstrating the Petitioner  
 24 lacks evidence that is sufficient to make the necessary showing.  
*25 Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91  
*26* L.Ed.2d 265 (1986). This is not the Respondent's only potential path

1 to summary judgment. Assuming, for purposes of argument, the  
2 Petitioner satisfies his initial burden of production, the burden will  
3 shift to the Respondent to rebut the Petitioner's evidence. The  
4 Respondent may qualify for summary judgment by demonstrating his  
5 rebuttal evidence is so overwhelming that a rational fact-finder would  
6 be compelled to find the Petitioner is not a United States citizen.

7 See *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th  
8 Cir.2007) ("Where the moving party will have the burden of proof on an  
9 issue at trial, the movant must affirmatively demonstrate that no  
10 reasonable trier of fact could find other than for the moving  
11 party."). In determining whether the Respondent is entitled to  
12 summary judgment, the Court must view the evidence in the light most  
13 favorable to the Petitioner; drawing all justifiable inferences in his  
14 favor. *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th  
15 Cir.2011).

16 **RESPONDENT IS NOT ENTITLED TO SUMMARY JUDGMENT**

17 The Respondent urges the Court to grant summary judgment because,  
18 in his opinion, the Petitioner's evidence is incredible. In making  
19 this argument, the Respondent concedes that, as a general rule, a  
20 judge should refrain from assessing the credibility of a witness when  
21 ruling upon a summary judgment motion. *Anderson v. Liberty Lobby,*  
22 *Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). While  
23 this is the general rule, there is an exception. "When opposing  
24 parties tell two different stories, one of which is blatantly  
25 contradicted by the record, so that no reasonable jury could believe

1 it, a court should not adopt that version of the facts for purposes of  
2 ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S.  
3 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Contrary to the  
4 Respondent, this is not such a situation. Although a rational fact-  
5 finder could decide the Petitioner's evidence is incredible, a fact-  
6 finder would not be compelled to do so. Thus, the Respondent is not  
7 entitled to summary judgment.

8 **PETITIONER'S SUMMARY JUDGMENT MOTION IS UNTIMELY**

9 Dispositive motions were to have been filed by December 20, 2010.  
10 The Petitioner did not file a timely dispositive motion, nor did he  
11 ask for an extension of the deadline. Instead, during the course of  
12 the hearing on the Respondent's summary judgment motion, the  
13 Petitioner orally moved for summary judgment. Since the Petitioner  
14 did not attempt to establish good cause for the delay, Fed.R.Civ.P.  
15 16(b) (4), the Court declines to consider the Petitioner's oral motion.

16 **CONCLUSION**

17 A genuine dispute of material fact exists with respect to whether  
18 the Petitioner is Reynaldo Mondaca Carlon, a citizen of the United  
19 States, or Salvador Mondaca-Vega, a citizen of Mexico. Neither party  
20 is entitled to summary judgment. An evidentiary hearing is necessary.  
21 At the hearing, the Petitioner will have the initial burden of  
22 production. This will be his opportunity to offer, subject to the  
23 Federal Rules of Evidence, any exhibits and testimony he deems  
24 appropriate in support of his allegation that he is a United States  
25 citizen. If the Petitioner satisfies his initial burden, the burden

1 will shift to the Respondent. During the second phase of the hearing,  
2 the Respondent may offer any exhibits and testimony he deems  
3 appropriate to rebut the Petitioner's *prima facie* case; again, subject  
4 to the Federal Rules of Evidence.

5 **IT IS HEREBY ORDERED:**

6 1. The "Respondent's Motion for Summary Judgment" (**Ct. Rec. 51**)  
7 is **denied**.

8 2. The Petitioner's **oral** motion for summary judgment is **denied**.

9 **IT IS SO ORDERED.** The District Court Executive is hereby  
10 directed to enter this order and furnish copies to counsel.

11 **DATED** this 29th day of March, 2011.

13 s/ Fred Van Sickle  
14 Fred Van Sickle  
15 Senior United States District Judge